

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2153

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VINCENT D. YANNI,
Petitioner-Appellant,

- v -

UNITED STATES OF AMERICA
Respondent-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT

In reply to Respondent's Brief and Appendix, Petitioner submits the following facts and argument. /

1.. On the question of the Court's failure to inquire with respect to the possible conflict of interest in Mr. Alperin's joint representation of petitioner and defendant Colangelo:

Respondent asserts that "Judge Tyler discussed the conflicts issue with counsel" on June 7, 1972, and that "in response to [that] colloquy" Alperin advised the Court by letter on June 15, 1972, that "both my clients have stated that there is no possible connection between them and they know of no conflict. Therefore, they wish me to continue to represent them." (Resp. Brief, pp.4,5) Respondent further asserts that Alperin "reaffirmed these representations in an affidavit submitted on Yanni's present petition." (Resp. Brief, p.10 fn.)

Petitioner submits that these statements by Mr. Alperin are incorrect and untrue - either deliberately false or otherwise wholly mistaken. Petitioner states again that

at no time prior to the commencement of the trial on August 21, 1972, did Mr. Alperin discuss the fact of his joint representation of Petitioner and Colangelo and the possibility of conflict. In an affidavit dated August 8, 1977, Colangelo confirms that Alperin never discussed this possibility of conflict with him at any time prior to the trial. (Petition, Ex. B) As stated previously, Petitioner was unaware that Alperin even represented Colangelo until the day, August 21, 1972, that the trial began.

2. On the question of Petitioner's lack of knowledge of the joint representation by Mr. Alperin of Petitioner and Colangelo.

Respondent asserts that the "District Court, in its opinion, noted that this claim was contradicted by the transcript of July 18, 1972, which reflected that Mr. Alperin appeared as attorney for both Yanni and Colangelo and that both defendants were present in court that day....Indeed, at the arraignment Mr. Alperin spoke of 'my clients' in the plural, making clear the present lack of merit in Yanni's claim." (Resp. Brief, p.5 fn.)

Petitioner was present in court on July 18, 1972, according to the transcript of that day's hearing. According to the same transcript Mr. Alperin did have a conversation with Judge Tyler at the bench in which he alleged that he represented both Petitioner and Colangelo. But that conversation was not and could not have been heard by Petitioner (or Colangelo for that matter) from where he sat in the courtroom, and Mr. Alperin did not report the conversation or any part of it to Petitioner.

As previously stated, Petitioner was unaware of the fact that Mr. Alperin represented Colangelo until the day the trial began, August 21, 1972.

3. On the question whether a conflict of interest was created by Mr. Alperin's joint representation of Petitioner and Colangelo:

Respondant asserts that "it is manifest from the record that Yanni's and Colangelo's defenses were not inconsistent or in any way in conflict with one another...Yanni's and Colangelo's defenses in fact were consistent and presented a common theme." Respondent argues that since the principal evidence against the defendants consisted of taped telephone conversations between Petitioner and one La Cosa in which reference was made to "shirts" and between Colangelo and La Cosa in which reference is made to "pants"(terms which the Government contends referred to heroin and cocaine respectively), and since "the thrust of the defenses of Yanni and Colangelo...was that these words were used innocently and in their ordinary and every day sense....These defenses, accordingly, fit together comfortably and without tension." (Resp. Brief, pp.10,11)

Addressing this last assertion first, Petitioner submitted as Exhibit A to his petition a page from the transcript in which Alperin, referring to a newspaper article on organized crime and what the police were doing about it, stated to Judge Tyler: "I discussed it, to be frank, placing my client on the stand and discussed the problems he would have." Respondent asserts that this statement is improperly quoted out of context and that, properly interpreted, was

no more than a reference to the impact of pre-trial publicity and clearly was not a remark on any difficulty that might arise from one defendant taking the stand." (Resp. Brief. p.6) Respondant further notes that "Judge Weinfeld found 'implausible' Yanni's claim that the testimony could have damaged Colangelo's defense...." (Resp. Brief, p.7)

Petitioner calls the attention of the Court to the fact that in the statement quoted above Mr. Alperin is talking about "my client," singular, and about the problems "he" could have. Petitioner submits that the quoted remark does not refer to the adverse effect of pre-trial publicity on testimony by petitioner and Colangelo but about the specific problem involved in putting his "client", singular, on the stand, the problems "he" would have.

Petitioner had advised Alperin that he wished to take the stand. He had also advised him that the taped conversations offered by the Government referred only to "Butch", that petitioner was not known as Butch or called Butch, that he was called "Vinnie" and known only by that name, and that the Government should be compelled to prove beyond a reasonable doubt that it was his voice that was on the tapes. Petitioner also advised Mr. Alperin, that, contrary to the defense put forward by Alperin for Petitioner and Colangelo, if the Government had any tapes of his voice in which the word "shirts" was used, the word would have referred to money since Petitioner was in the money lending business and not the drug business.

Petitioner further submits that it is not necessary for Petitioner's testimony to contradict or discredit Colangelo's defense in order for such testimony to be damaging and highly prejudicial. How could Alperin, representing two defendants, each alleged to be a buyer of drugs from a single source and each charged on the basis of separate, parallel telephone conversations with that source, put one defendant on the witness stand and keep the other off? The practical, unavoidable prejudice arising from a failure to testify is enough of a liability. To have that failure underscored and hammered home by the testimony of a co-defendant who is acting under the advise of the same attorney would almost certainly be fatal to any defense. If that testimony denied the Government's identification of the taped voice as that of the defendant testifying, the failure of the other defendant to testify on that point would virtually concede the identification in his case. If that testimony put forward an interpretation of the word "shirts" wholly at odds with the interpretation of the word "pants" put forward by joint counsel on behalf of his other client, both interpretations become for that reason more suspect. The decision whether Petitioner should take the stand must be considered to be as crucial to Colangelo as to Petitioner. Shall we benefit one defendant and thereby damn the other or shall we hamstring one defendant and thus protect the other.

Contrary to the statement of Judge Weinfeld quoted on page 6 of Respondent's Brief, there is every reason to believe that the proper defense of Petitioner, including eliciting his sworn testimony, would have "implicated" Colangelo by severely damaging his defense.

4. On the question whether Petitioner had "effective assistance of counsel".

Respondent, as did Judge Weinfeld, further argues that, on the positive side, the record plainly demonstrates that Mr. Alperin furnished "competent and zealous representation of each defendant," that "there is no basis for any claim that Alperin's representation of Colangelo in any way militated against a vigorous and competent defense of petitioner" (Resp. Brief, p.8) and that "Defense counsel forcefully and effectively cross-examined the witnesses against Yanni, persuasively argued his defense, as well as Colangelo's, both in opening and summations, and, attended with personal concern to Yanni's special medical problems which arose at trial."

Respondent asserts that Judge Weinfeld "carefully reviewed the complete trial and suppression record of over 3000 pages of minutes and concluded that 'the government has demonstrated and the record reflects beyond preadventure that no prejudice occurred' from the fact that Yanni and Colangelo were both represented by the same attorney."

Petitioner submits that nowhere in those 3000 pages did Judge Weinfeld find any evidence or argument or any cross-examination questioning the identification of Petitioner as "Butch" and Petitioner's voice as the voice of the Government tapes, any evidence of petitioner's background, employment, business activities or associates, or any evidence that petitioner, who admittedly had "special medical problems" at the trial, was fully aware of the evidence offered against him or the defense being put forward on his behalf. Nor does the record show that Mr. Alperin at any time advised the

Court that Petitioner wished to take the stand and Mr. Colangelo did not and that he had persuaded Petitioner to change his mind. Respondent admits, in a footnote to his statement that "the Government proved that Yanni and others, including Colangelo, were distributors of narcotics", that "Yanni (i.e. Yanni's attorney) did not contest the sufficiency of the evidence against him." (Resp. Brief, p.5) Presumably no motion was made to dismiss the indictments on that ground at the close of the case despite the fact that admittedly, the only evidence against Petitioner were taped telephone conversations with a person of a different name and an unidentified voice and the transport of a box the contents of which were unknown. (Resp. Brief, p. 11)

5. On the general question of the existence of a conflict of interest in Mr. Alperin's representation of both Petitioner and Colangelo:

The colloquy at the bench that took place on June 7, 1972, before Judge Tyler had been preceded by a similar discussion before Judge Palmieri on May 1, 1972. At that time, according to an affidavit of Angus C. MacBeth, Assistant United States Attorney, "Judge Palmieri raised with other counsel the possibility of conflicts of interest through the representation of more than one defendant but since Yanni was not present and was not at that time represented by an attorney also representing another defendant, this issue was not directly put to him or his counsel."

On June 7, 1972, when the matter came up before Judge Tyler, the fact of conflict of interest was forcefully put before the Court by the United States Attorney. The Court

stated: "Gentlemen, the government represents that there will be a conflict of interest between all defendants and if that is the representation, I think given the state of the law we are going to have to ask these defendants to get separate counsel." (Transcript, June 7, 1972, p. 18)

Later in the same proceeding, the Court advised counsel: "However, we do have the representation from the government lawyer who knows presumably best of all what the evidence is going to be that there well may be a conflict." (Transcript, June 7, 1972, p. 20) Nor was the Court overstating the Government's position. Mr. Tierney, an Assistant United States Attorney on the trial staff had the following exchange with the bench (Transcript, June 7, 1972, p.18):

MR. TIERNEY: I believe there is a serious conflict, your honor.

THE COURT: You believe there is?

MR. TIERNEY: Absolutely.

A similar exchange took place between the Court and Mr. Walker, the Assistant United States Attorney in charge of the trial (Transcript, June 7, 1972, pp. 20,21):

THE COURT: How do you suggest, Mr. Walker--won't you agree with Mr. Richman and me that we can't really and, indeed, you don't want to be the sole decider of conflict of interest. Correct?

MR. WALKER: That's correct.

THE COURT: Then what are you really suggesting? Here I have never heard of this case before.

MR. WALKER: It appears to Mr. Tierney, who has reviewed this case completely, that there are situations that will arise during the course of the trials which would present the problem of there being a conflict of interest in this case. All I can say is that from my own experience

recently I had a case in which there was such a conflict of interest and it was very, very difficult for the lawyers, the defense lawyers involved.

THE COURT: I won't quarrel with anything you have.

MR. WALKER: When you have a conspiracy, it seems to me that each individual will be trying to see whether he can get out of the conspiracy and in doing so he is at odds with every other defendant in the case.

The Court reserved decision on the question. Between June 7, 1972 and the next hearing on July 18, 1972, the Court had received the letter of June 15, 1972, from Mr. Alperin stating that Petitioner and Colangelo wished him to represent both of them since there was "no possible connection between them" and they knew of "no conflict".

Quite obviously, in view of the exchanges between the Court and the Government counsel on June 7, 1972, the Court's decision to permit Mr. Alperin to represent both Petitioner and Colangelo had to be based almost entirely on Mr. Alperin's letter. If that was false, as in fact it was, the whole basis for the Court's assumption of consent and waived by Petitioner, of absence of the possibility of conflict, must disappear. More than that, Mr. Alperin's performance must be viewed in an entirely different light. In the words of the United States Attorney, "each individual will be trying to get out of the conspiracy and in doing so he is at odds with every other defendant in the case." Petitioner submits that Mr. Alperin could not effectively represent both him and Colangelo, that he had to favor one at the expense of the other, and that it was Colangelo who was favored.

It is not enough to say that Mr. Alperin devoted as much time to Petitioner's defense as to Colangelo's or that

his cross examination of witnesses was "forceful and effective."* It is not enough to say that Petitioner's testimony would not have contradicted or disparaged Colangelo's defense since each was convicted on separate evidence. The fact remains that Petitioner was kept off the stand and important parts of his defense were omitted or left unstressed and Petitioner submits that this was so because Mr. Alperin felt, quite correctly, that he could not put one of his clients on the stand and keep the other one off without damning the one who kept silent.

Respondent argues that Petitioner's complaint is a belated one. Perhaps it is and Petitioner apologizes to this Court for the delay. But whatever competence Petitioner may have it is not in the law.

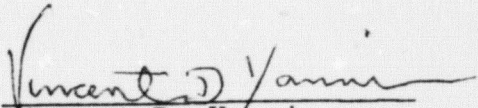
Petitioner was not aware until the trial that his attorney also represented another defendant. Petitioner was not aware during the trial of the consequences of that joint representation. The "special medical problems" which existed at the trial and which contributed to Petitioner's lack of understanding persist today. While the District Court found the Petitioner competent to stand trial, Petitioner submits that such a finding does not preclude a lack of competence to understand the dangers of joint representation by a single attorney.

* So "forceful and effective" was this cross-examination that it took questioning by Judge Tyler to elicit the fact that none of the four informers had ever heard of Vincent Yanni or "Butch" Yanni and that none had ever seen Petitioner before seeing him in Court.

In Conclusion:

Petitioner submits that the order of the District Court should be reversed and a new trial ordered with respect to the Petitioner.

Respectfully submitted,


Vincent D. Yanni,
Petitioner - Pro Se